or should have known, that automobile engines would be running. The fact that the violation in issue is a result of an act of omission rather than an act of commission is utterly immaterial. *Bush Terminal Bldgs. Co. v. Luckenbach S. S. Co.*, 9 N. Y. 2d 426, 214 N.Y.S. 2d 428, 174 N. E. 2d 516 (1961)

Wholly different are the many cases in which the accident occurred not because of a defect in defendant's plant but because the plaintiff used unsafe materials not under the control or supervision of the defendant. *Gasper* v. *Ford Motor Co.*, 13 N. Y. 2d 104, 242 N.Y.S. 2d 205 (1963); *Wallach* v. *United States*, 291 F. 2d 69 *cert. denied* 368 U. S. 935; *McFall* v. *Compagnie Maritime Belge* (Lloyd Royal S. A., 304 N. Y. 314, 107 N. E. 2d 463 (1952).

Defendant's reliance on *Jackson* v. *Associated Dry Goods Corp.*, 13 N. Y. 2d 112, 242 N.Y.S. 2d 210 (1963), is misplaced. There the plaintiff was injured when she fell over loose gravel in defendant's parking lot. The defendant cross-claimed against the Posillico Construction, Inc. The Court of Appeals held that the cross-claim would lie because the defendant could not be guilty of active negligence solely because it had constructive notice of the rocks in the driveway. Posillico, however, was unquestionably and undeniably negligent in that case because the rocks were left over from construction work done by Posillico for Nassau County.

In the case at bar, however, Larsen has failed to impute any negligence to Ford via the acts of Ford's employees.

Defendant Larsen's attempt to show that it had not violated a "non-delegable duty statute" like § 241 of the Labor Law, is irrelevant. Defendant cites *Semanchuck* v.

Fifth Avenue and 37th Street Corp., 290 N. Y. 419, 49 N. E. 2d 508 (1943) and *Wischnie* v. *Borsch*, 296 N. Y. 257, 72 N. E. 2d 700 (1947). Analogized to the facts of the instant case the most that these cases could stand for is the proposition that if Ford were negligent Larsen in the appropriate factual setting could obtain indemnity from Ford. Ford, however, was not negligent. Accordingly, *Semanchuck* and *Wischnie* do not help the defendant.

The cross-claim over must fail. Defendant Larsen must bear the consequences of its violation of §§ 200 and 299 alone.

DAMAGES

The provable damages supported by a preponderance of the evidence are as follows:

Estimated pecuniary benefits from earnings already lost to date of judgment.[8]	$ 51,100.00
Estimated present value of future lost benefits from decedent's earnings (discounted at 5 percent)	139,000.00
Estimated value of personal services and attention which decedent would have given to and which would have been of material value to his family	24,000.00
Funeral expenses	1,799.00

At the time of his death, Gasperino, then at age 46, had a life expectancy of 26.3 years and a work expectancy of 18.8 years. For each of the five years directly preceding

[8] The discount is not applied to periods antedating judgment. *Montellier* v. *United States*, 202 F. Supp. 384, 424 (E.D.N.Y.), *aff'd* 315 F. 2d 180 (2d Cir. 1963).

his death Gasperino had earned an average of approximately $10,000.00, and, based upon his excellent past record, Gasperino could look forward to earning in the future increased amounts resulting from merit and promotional increases. The evidence adduced at the trial also indicates that Gasperino contributed the whole of his salary to his family except for $15.00 each week which he required for personal use. Accordingly, this court finds that from the time of his death until the date of this judgment, Gasperino would have earned $55,000.00 and would have contributed $51,100.00 of that amount to his family. Based upon a consideration of Gasperino's life expectancy, his work qualifications, his income and prospects and his practice in respect to supporting his family, the court finds that during the course of the remainder of his work expectancy (approximately fourteen years), Gasperino would have earned $212,708.00, and would have contributed $202,000.00 of that amount to his family. The present value of $202,000.00 discounted at an interest rate of 5 percent comes to $139,000.00. Thus, this court finds that plaintiff is entitled to a total of $190,100.00 for the amount of contribution Gasperino would have made to his family had he been permitted to enjoy the years of life to which he normally could have looked forward.

In addition to the value of the lost contributions, the plaintiff is entitle to recover on behalf of the children for the loss of parental care and guidance, provided that there be evidence of the fitness of the parent and that the children have been deprived of the advantages of a good parental relationship and strong father image. The record is abundantly clear that Gasperino was a good father; he was diligent and attentive to the needs of his children. He spent much time with them and personally trained his sons in the skills of his trade. Had Gasperino been

able to enjoy the full span of his life he would have been able in his role as a father to continue to guide and assist in the moral and educational upbringing of his children. While it is difficult to fix a precise mathematical decimal point value for the deprivation of this parental care and guidance, nevertheless the deprivation of intellectual, moral, and physical training suffered by the children is such as to admit of an evaluation based on an estimate of the reasonable value of the loss involved. The court finds, in view of the close relationship that existed between Gasperino and his three children, that Judith Gasperino (aged 19 at the time of father's death) is entitled to $2000.00; that Gregory Gasperino (aged 17 at the time of father's death) is entitled to $4000.00; and that Anthony Gasperino (aged nearly 12 at the time of father's death) is entitled to $18,000.00. In sum, the court finds that $24,000.00 is a reasonable award for the deprivation suffered by decedent's children.

Finally the plaintiff is entitled to funeral expenses incurred on Gasperino's behalf in the amount of $1,799.00.

Thus, the court finds that the total amount of the damages sustained by the beneficiaries of Gregory Gasperino to be $215,899.00 plus interest of $64,770.00. Judgment in the amount of $280,669.00 is to be entered solely against Larsen Ford, Inc. Accordingly, the claim over against Ford Motor Company fails in all respects.

The foregoing constitutes the findings of fact and conclusions of law of the court under Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.

So ordered.

DAVID M. EDELSTEIN,
U. S. D. J.

Dated: New York, N. Y., June 5, 1969.

Filed June 5, 1969,
U.S.D.C. S. D. of N. Y.